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IN THE

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

JANE DOE, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF LIBERTY COUNSEL AND LIBERTY ALLIANCE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*

Liberty Counsel

Liberty Counsel is a non-profit civil liberties education and legal defense organization.[1] Liberty Counsel provides education and legal representation regarding the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment to the United States Constitution. Attorney Mathew D. Staver and Liberty Counsel have been actively engaged in defending the rights of students' free speech within public schools. In 1993, Liberty Counsel intervened on behalf of a number of public school students to become co-defendants in which Liberty Counsel has defended the constitutionality of a graduation message policy. The policy at issue in Jacksonville, Duval County, Florida, states as follows:

> 1. The use of a brief opening and/or closing message not to exceed two minutes, at high school graduation exercises shall rest within the discretion of the graduating class;
>
> 2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;
>
> 3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and shall not be monitored or

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[1] Liberty Counsel files this brief with the consent of all parties. The letters granting consent are on file with this Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

> otherwise reviewed by Duval County School Board, its officers or employees;
>
> The purpose of these guidelines is to allow students to direct their own graduation message without monitoring or review by school officials.

Adler v. Duval County Sch. Bd., 851 F. Supp. 466 (M.D. Fla. 1994), *aff'd in part, vacated in part, and remanded in part*, 112 F.3d 1475 (11th Cir. 1997).

The above-cited *Adler* case was first argued before the Eleventh Circuit Court of Appeals in 1995 and then again in 1996. In 1997 the Eleventh Circuit vacated the case in part because the plaintiffs had graduated. In May of 1998, Emily Adler, the sister of the original plaintiff, Karen Adler, brought a second suit against the Jacksonville, Duval County, School Board challenging the same policy. Again, Liberty Counsel intervened on behalf of a new set of students to become co-defendants defending the constitutionality of the message policy. In *Adler v. Duval County Sch. Bd.*, No. 98-460-CIV-J-10C (M.D. Fla. May 27, 1998), the same federal district judge as in the original *Adler* case again upheld the constitutionality of the policy against an Establishment Clause challenge. The District Court also ruled that the graduation policy created a limited public forum for student messages and to censor the religious content of said messages would violate the Free Speech Clause. In August of 1999, the case was again argued before the Eleventh Circuit Court of Appeals. On May 11, 1999, the Eleventh Circuit, in a 2-1 decision, found the policy unconstitutional, in part because the Court ruled that students became state actors whenever they entered the graduation podium. Liberty Counsel on behalf of the student-intervenors filed a Motion for Rehearing *en banc* which was granted on June 3, 1999, thus vacating the decision and setting the case for *en banc* oral argument. *Adler v. Duval County Sch. Bd.*, 174 F.3d 1236 (11th Cir. 1999). Counsel of record then argued this case before a panel of twelve judges at the Eleventh Circuit Court of Appeals on October 19, 1999. A decision on the matter is pending.

Liberty Alliance

The Liberty Alliance is a non-profit education and lobbying organization founded in 1986. The Liberty Alliance's activities include educating the public and influencing public policy regarding the role of government in preserving and implementing religious freedoms and traditional family values in the United States of America.

As part of advancing its purpose, Liberty Alliance provides educational resources to the general public, coordinates petition drives to express the opinions of citizens to lawmakers, coordinates regional educational seminars for religious and lay community leaders, and publishes articles and produces videos for distribution to the public.

Liberty Alliance is participating with Liberty Counsel in the filing of this brief because it is particularly interested in protecting the constitutional rights of public school students to speak at high school sporting events. Attorney Jerry L. Falwell, Jr. is General Counsel to The Liberty Alliance.

SUMMARY OF ARGUMENT

The Guidelines allow the students to decide whether to have a message and/or an invocation at varsity football games. As such, the Guidelines have created a limited public forum for student speech. Within this forum the student volunteer can present a secular or religious message at his or her discretion. The school remains aloof and uninvolved. Since the school has allowed the student speakers to select their own topics, including controversial subject matters, then the school has clearly created a limited public forum for student speech. Speakers can be excluded from this limited public forum only when the exclusion is necessary to serve a compelling interest.

Respondents seek an injunction requiring the school to censor student speech based solely on its content. Censorship of student

speech for religious content is unconstitutional in a limited public forum. Moreover, if the school did not create a limited public forum for student speech, an injunction censoring student religious speech would result in viewpoint censorship even in a nonpublic forum. Under the Guidelines the students can speak on any topic. However, an injunction censoring religious speech would allow the students to speak on any topic except from a religious viewpoint. Viewpoint censorship even in a nonpublic forum is unconstitutional.

The Guidelines do not violate the Establishment Clause. The Guidelines have a secular purpose of calling to order the beginning of the varsity sporting event. Since the Guidelines allow secular and religious speech, the Guidelines have a secular purpose. Moreover, the Guidelines do not have the primary effect of advancing religion. Since the content of the message is left up to the individual student, the school does not have any idea what message will be presented. The message can be secular, sacred, profane or profound. The school remains aloof and uninvolved. The school does not mandate the content of the message.

Requiring the school to censor student messages by editing out religious content would violate the Establishment Clause by showing hostility toward religion and by creating excessive entanglement with religion. The school would have to make doctrinal choices between what is and is not religious.

The Guidelines provide no coercion with regards to religious speech. The school does not select the speaker, the content of the speech, and does not give any guidelines on how to say a religious message. Clearly private religious speech has very little potential for coercion, and in the context where the school remains aloof from the content of the message, there can be no governmental coercion.

ARGUMENT

I.

CENSORING STUDENT-INITIATED, STUDENT-LED SPEECH AT HIGH SCHOOL SPORTING EVENTS VIOLATES THE FREE SPEECH CLAUSE.

Students on public school campuses retain their rights as private citizens when they enter school property. One of these rights is the right to freedom of speech. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969).

Addressing graduation prayer, this Court recognized the following at the conclusion of the majority opinion:

> A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution. . . . We recognize that, *at graduation time* and throughout the course of the educational process, ***there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students.***

Lee v. Weisman, 505 U.S. 577, 598-599 (1992)(emphasis added).

Clearly the case before this Court represents one of those instances envisioned by this Court in *Lee*. The Guidelines clearly create a limited public forum for student expressive activity. Within this limited public forum, students are able to express whatever view they desire without school oversight, supervision, or editorialism. Even in the absence of a limited public forum for student expression, the Respondents' requested injunction, which requires school intervention in the form of censorship, would nevertheless violate the First Amendment based upon viewpoint-based discrimination.

A.

Content Censorship of Student-Initiated And Student-Led Religious Speech In A Limited Public Forum Is Unconstitutional.

The Guidelines clearly create a limited public forum for student expression during graduation ceremonies. The Guidelines state in pertinent part as follows:

> The Board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition . . . . The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

"To ascertain what limits, if any, may be placed on protected speech, [the Supreme Court has] often focused on the place of that speech, considering the nature of the forum the speaker seeks to employ." *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). *See also Heffron v. ISKCON*, 452 U.S. 640 (1981); *United States v. Kokinda*, 497 U.S. 720 (1990). "A public forum may be created for a limited purpose such as use by certain groups." *Perry Educational Assoc. v. Perry Local Educator's Assoc.*, 460 U.S. 37, 49 n.9 (1983). A designated or limited public forum is "created when the government opens property to the public for expressive activity." *Id.* "A limited public forum is a forum for certain groups of speakers or for the discussion of certain subjects." *Id.* at 591; *see also Widmar v. Vincent*, 454 U.S. 263 (1981); *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n.*, 429 U.S. 167 (1976).

In determining whether property has been designated a limited public forum there are several relevant factors. *See Cornelius v.*

NAACP Legal Defense and Ed. Fund, Inc., 473 U.S. 788, 803 (1985). The first factor is governmental intent. "The nature of the property and its compatibility with expressive activity provide additional bearing on intent." *Id.* at 802. However,

> the forum inquiry does not end with the government's statement of intent. To allow... the government's statement of intent to end rather than to begin the inquiry into the character of the forum would effectively eviscerate the public forum doctrine; the scope of the first amendment rights would be determined by the government rather than by the Constitution... Forum classification should be triggered by what a school does, not what it says.

Gregoire v. Centennial School Dist., 907 F.2d 1366 (3rd Cir. 1990) (*quoting Bd. of Edu. of Westside Community v. Mergens*, 496 U.S. 226 (1990)). "The determination of whether the government has designated a public forum is based upon two factors: governmental intent and the extent of use granted." *Brody v. Spang*, 957 F.2d 1108, 1117 (3rd Cir. 1992)(*citing Gregoire*, 907 F.2d at 1371). Courts have recognized that a limited public forum may be created during a graduation ceremony.

> ***If, for example, school officials have authorized students to choose which of them will speak, and have permitted those speakers to select their own topics, including controversial subject matters, then officials may have created a limited public forum.*** Not only would such a practice demonstrate an intent to foster public discourse, but it would avoid attaching the imprimatur of the school to the views expressed in the student's speeches.

Brody, 957 F.2d at 1120 (emphasis added); *see also Lundberg v. West Monona Community Sch. Dist.*, 731 F. Supp. 331 (N.D. Iowa 1989)(recognizing that a school can create a public forum during the graduation ceremony).

The Guidelines create a limited public forum during high school sporting events. The Guidelines do not prescribe the content of speech. The students have full and unbridled discretion as to whether a message will be included at the event, and, if included, its content. A student wishing to engage in sectarian or non-sectarian speech can do so without interference or promotion by the school. Because the Guidelines allow any student speech on any topic, they have created a limited public forum.

It would be completely out of character with the public forum doctrine for the school to allow unbridled discretion for a student to speak on any topic and yet to hold that such a grant of unbridled discretion does not evince an intent by the school to create a public forum. Indeed, it is exactly this type of intent that creates a public forum. The state is uninvolved and aloof. The School neither approves or disapproves of the content of the speech to be given by the student. As a matter of fact, the school has no idea what the student may or may not say. Under the Guidelines, it would be just as permissible for a student to say absolutely nothing, or to give a purely secular speech, as it would for the student to say something religious.

Because the Guidelines create a limited public forum, any content-based restrictions on speech in that forum must pass strict scrutiny. Speakers can be excluded from a limited public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. *See Perry Education Ass'n*, 460 U.S. at 45-46; *United States v. Kokinda*, 497 U.S. 720, 726-27 (1990). This Court has stated:

> In these quintessential public fora, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end... The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government

> interest, and leave open ample alternative channels of communication.

Frisby v. Schultz, 487 U.S. 474, 479 (1988)(*quoting Perry Education Ass'n.*, 460 U.S. at 49). Exclusion of speech which might be subjectively viewed as "religious" is a content-based restriction that cannot be countenanced under the First Amendment. Such a content-based restriction runs counter to the idea that "schools are peculiarly the marketplace of ideas." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Rivera v. Board of Regents*, 721 F. Supp. 1189 (D. Colo. 1989); *Thompson v. Waynesboro Area School District*, 673 F. Supp. 1376 (N.D. Pa. 1987). Such content-based regulations cannot be tolerated. *See Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992). Stressing its disdain for content-based prohibitions, this Court stated:

> But, above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter or its content. [citations omitted]... The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principles that debate on public issues should be uninhibited, robust and wide open."

New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1963)(*quoting Police Dep't v. Mosley*, 408 U.S. 92, 95-96 (1972)). Content-based regulations of speech constitute "censorship in a most odious form." *Cox v. Louisiana*, 379 U.S. 536, 581 (1965)(Black, J. concurring). Granting an injunction to Respondents would only censor the "religious" content of student speech.

The Eleventh Circuit Court recognized that "the Free Speech and Free Exercise Clauses of the First Amendment require the State to tolerate genuinely student-initiated religious speech in schools." *Chandler v. James*, 180 F.3d 1254, 1258 (11th Cir. 1999). "It is

true that ordinarily religious speech by private persons cannot establish religion, even if it occurs in a public institution, such as a school." *Id.* at 1258 (*citing Mergens*, 496 U.S. at 250). The same Court also acknowledged the following:

> Permitting students to speak religiously signifies neither State approval nor disapproval of that speech. The speech is not the State's -- either by attribution or adoption. The permission signifies no more than that the State acknowledges its constitutional duty to tolerate religious expression. Only in this way is true neutrality achieved.

Chandler, 180 F.3d at 1261. "Because genuinely student-initiated religious speech is private speech endorsing religion, it is fully protected by both the Free Exercise and the Free Speech Clauses of the Constitution." *Id.*

In the present case, Respondents request this Court to condone an injunction in the context of a limited public forum that would result in a content-based restriction on speech some bureaucratic censor might deem religious. Such a content-based restriction may not be countenanced by arguing that the students are governmental actors. In *Bethel School District v. Fraser*, 478 U.S. 675 (1986), this Court recognized the distinction between school-sponsored speech and the private expression of students. "It is clear that the mere fact that student speech takes place on school property does not transform it into government speech." *Id.* at 681. In this case, the students are not government actors, are not acting in concert with the school, and do not seek government support or endorsement of speech. "Religious speech by students does not become forbidden 'state action' the moment the students walk through the schoolhouse door." *Chandler*, 180 F.3d at 1261-62. Indeed, "students are not state actors and, therefore, by definition, their actions cannot tend to 'establish' religion in violation of the Establishment Clause." *Id.* at 1258. Numerous other cases suggest that a student's expression is personal if it is voluntary and not dictated by any individual group. *See Mergens*, 495 U.S. at 226. "There is a crucial difference between government speech endorsing

religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* at 248. "A student's individual decision to pray or otherwise speak religiously is not the state's command. Such speech is fully protected." *Chandler*, 180 F.3d at 1264 (citations omitted).

"At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and appearance." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994). This Court has made clear that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753, 760 (1995). This Court has noted that when the State does not sponsor the private speech, when the expression is made on government property that has been opened as a forum for speech, and when permission is requested through the same application process and on the same terms required as other speakers, then the Establishment Clause is not implicated when religious speech is presented. *Id.* at 762. "It is no answer to say that the Establishment Clause tempers religious speech. By its terms that Clause applies only to the words and acts of *government*. It was never meant, and has never been read by this Court to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in a public forum." *Id.* at 766. "Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms." *Id.* at 769.

B.

Viewpoint Censorship of Student-Initiated And Student-Led Religious Speech In A Non-Public Forum Is Unconstitutional.

Clearly the Guidelines have created a limited public

forum for student expressive activity during graduation ceremonies. Within this limited public forum, the students are free to speak on any topic, secular or sacred, profane or profound. However, even if the Guidelines do not create a limited public forum for student expressive activity, the Respondents' request for Injunctive Relief is nevertheless unconstitutional because even in a non-public forum, viewpoint-based discrimination is impermissible. Control over access to a non-public forum can be based on subject matter and speaker identity as long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral. *Cornelius v. NAACP Legal Defense and Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985). This Court has stated the following:

> Although a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum ... or if he is not a member of the class of speakers for whose especial benefit the forum was created ..., ***the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject.***

Id. at 806 (emphasis added).

In *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), this Court invalidated a school policy which excluded use of the facilities for religious purposes. This Court ruled that the church's film series dealt with an otherwise includable subject. The film was denied solely because of its religious viewpoint. "The principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor

some viewpoints or ideas at the expense of others.'" *Id.* at 394 (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). This Court also ruled that there was no Establishment Clause interest at stake, because when property is used for religious purposes under an open access policy, the Establishment Clause is not implicated. *See Lamb's Chapel*, 508 U.S. at 394-395 (*citing Widmar*, 454 U.S. at 271).

The policy in *Lamb's Chapel* stated that the premises "shall not be used by any group for religious purposes". *Lamb's Chapel*, 508 U.S. at 387. This Court did not decide whether the property was a limited public forum, but instead decided the case on the narrow issue of viewpoint discrimination, which is impermissible even in a non-public forum. *Id.* at 393.

Since the film series dealt with an otherwise includable or permissible topic, the Court found that the school unconstitutionally engaged in viewpoint discrimination by prohibiting a religious viewpoint on a permissible topic. "The principle that has emerged from our cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Id.* at 394 (*quoting Taxpayers for Vincent*, 466 U.S. at 804). "To discriminate 'against a particular point of view ... would ... flunk the test ... [of] *Cornelius* provided that the defendants have no defense based on the Establishment Clause.'" *Id.* (*quoting May v. Evansville-Vanderburgh Sch. Corp.*, 787 F. 2d 1105, 1114 (7th Cir. 1986)).

Lamb's Chapel then referred to its previous decision in *Widmar*, 454 U.S. at 263, thereby rejecting any Establishment Clause argument since the property also was used for secular purposes. *Lamb's Chapel*, 508 U.S. at 394-395.

In *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), the University of Virginia used student activity fees to fund a wide range of student newspapers but refused to fund a Christian student newspaper. This Court ruled against the University because it found that the school engaged in viewpoint discrimination.

> It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. Other principles follow from this precept. In the realm of private speech or expression, government regulation may not favor one speaker over another. Discrimination against speech because of its message is presumed to be unconstitutional. These rules informed our determination that the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression. When the government targets not the subject matter, but particular views taken by speakers on the subject, the violation of the First Amendment is all the more blatant. ***Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.***

Id. at 828-29 (emphasis added)(citations omitted).

Viewpoint discrimination is "presumed impermissible when directed against speech otherwise within the forum's limitations." *Id.* at 830. This Court rejected the University's argument that it did not engage in viewpoint discrimination because the guidelines discriminated against an entire class of

viewpoints. This Court noted:

> If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.

Id. at 831. "The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." *Id.* at 835. This Court rejected the University's Establishment Clause defense as follows:

> A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality toward religion. . . . We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and even-handed policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse. . . . **More than once *we have rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design.***

Id. at 839 (emphasis added)(citations omitted).

This Court concluded: "It does not violate the Establishment Clause for a public university to grant access to

its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises." *Id.* at 842.

An injunction in this case would necessarily be viewpoint-based. Respondents do not seek the suppression of all speech -- only speech of a supposed "religious" content. An injunction restraining "religious" content necessarily asks, "what is religious?" It is beyond dispute that Americans live in a religiously pluralistic society. Therefore, what may not be religious to one individual may be religious to another. Indeed, many religions refer to God differently. For the Islamic, God is "Allah", while for the Buddhist, God is "Buddha." Those of the animist religion believe God resides in certain animals while those of the New Age persuasion believe God resides in and around us like a "force." Secular Humanism, which the Supreme Court has defined as a religion, *see Torcaso v. Watkins*, 367 U.S. 488, 495 n.3 (1961), believes that man is God. Courts have recognized this plurality of religion. *See O'Hair v. Andrus*, 613 F.2d 931, 935 n.19 (D.C. Cir. 1979). It is clear that granting an injunction proscribing "religious" speech would necessarily fail for want of a clear definition of the content. Is, "May the Force be with you," religious? This type of viewpoint-based restriction would be unduly broad in its scope. In this case the student speech is "not required. Not commanded. Not even suggested. Simply permitted." *Chandler*, 180 F.3d at 1264. As the Eleventh Circuit Court noted: "The first principle must always be that genuinely student-initiated religious speech must be permitted. A student's individual decision to pray or otherwise speak religiously is not the State's command. Such speech is fully protected." *Id.* (citation omitted).

Since "religious speech is protected speech, government may not censor its content. . . . Suppression of religious speech constitutes viewpoint discrimination, the most egregious form of content-based censorship. . . . Government may not, therefore, censor religion from the content of students' protected speech at school." *Id.* at 1265 (citations omitted). "So long as school personnel do not participate in or actively supervise student-initiated speech, [the School Board] cannot constitutionally prohibit students from speaking religiously and [a] permanent injunction cannot require it to." *Id.* Clearly the student speech at issue in this case is student-initiated without any oversight by the School Board. Student speech is constitutionally protected even in a nonpublic forum. An injunction requiring censorship of a religious viewpoint is clearly unconstitutional, even in a non-public forum.

II.

THE GUIDELINES ALLOWING A STUDENT MESSAGE OR INVOCATION DO NOT VIOLATE THE ESTABLISHMENT CLAUSE.

A.

The Guidelines Do Not Violate *Lemon v. Kurtzman*.

The *Lemon* test states that a government regulation must have a secular purpose, its principal or primary effect must not be to advance or inhibit religion, and it must not foster excessive entanglement with religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). This Court has also stated that government coerces religious belief when the government directs a formal religious exercise by mandating prayer, choosing a clergy for the sole purpose of prayer, and

providing guidelines on how to deliver a non-sectarian, non-proselytizing prayer. The Guidelines do not violate either the *Lemon* or *Lee* tests. *See Lee v. Weisman*, 505 U.S. 577 (1992).

1. The Purpose Of The Guidelines Is Secular.

The Guidelines have a secular purpose and are neutral toward all student speech. An open forum policy promoting non-discrimination constitutes a valid secular purpose. *See Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1388-1389 (11th Cir. 1992)(en banc); *See also Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Sherman v. Community Consolidated School District 21*, 8 F.3d 1160 (7th Cir. 1993)(even-handed treatment of religious and non-religious groups makes the school district's policy indistinguishable from situations presented to the Supreme Court in both *Mergens* and *Lamb's Chapel*); *Doe v. Small*, 964 F.2d 611 (7th Cir. 1992)(en banc). The Establishment Clause is not implicated by treating all speech equally. In fact, "if the [Guidelines] were to differentiate and were to give preference to non-religious groups, this would raise an Establishment Clause concern." *Sherman*, 8 F.3d at 1165.

In *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999), the Eleventh Circuit Court discussed whether a school is allowed to "permit" students to speak on religious subjects during a graduation ceremony. *Id.* at 1258. In analyzing whether "permitting" students to speak was permissible under the Constitution, the Eleventh Circuit stated, "Permitting students to speak religiously signifies neither state approval nor disapproval of that speech. The speech is not the State's - either by attribution or by adoption. The permission signifies nothing more than that the State acknowledges its

constitutional duty to tolerate religious expression. Only in this way is true neutrality achieved." *Id.* at 1261. "Religious speech by students does not become forbidden "state action" the moment the students walk through the schoolhouse door." *Id.* at 1261-62.

This first prong of the *Lemon* test "aims at preventing the relevant decision maker from abandoning neutrality and acting with intent of promoting a particular point of view in religious matters." *Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 335 (1987).

In *Doe v. Madison School District No. 321*, 147 F.3d 832 (9th Cir. 1998) *vacated as moot Doe v. Madison School District No. 321*, 177 F.3d 789 (9th Cir. 1999), the Ninth Circuit affirmed a decision which found that a graduation policy "was motivated, at least in part, by a number of secular purposes, including a desire to grant top students the autonomy to deliver an uncensored speech... unwilling to trivialize the importance of bestowing responsibility on young adults." *Doe*, 147 F.3d at 837. Like this case, in *Doe* the policy simply allowed a student wishing to engage in sectarian or non-sectarian speech to do so without interference or promotion by the school.

> We conclude that the District's graduation policy survives the *Lemon* test. On its face, the policy has a secular purpose, its primary effect is not the advancement of religion, and it does not excessively entangle church and state... The significant control exerted by the school on the religious contents of the graduation program is missing. Indeed, it is the absence of this control which saves the graduation policy at issue from facial constitutional invalidation.

Doe, 147 F.3d at 838. A "policy of treating religious speech the same as all other speech certainly serves a secular purpose." *Americans United for Separation of Church and State v. City of Grand Rapids*, 908 F.2d 1538 (6th Cir. 1992)(en banc).

2. *The Guidelines Do Not Have The Primary Effect Of Advancing Religion.*

In applying the second prong of the *Lemon* analysis, courts must "determine whether the [regulation]... would create the effect of endorsing or approving religious beliefs." *Chabad*, 5 F.3d at 1389. The Guidelines evince nothing more than accommodation of the student's right to exercise their constitutional right to free speech. The school does not pre-review or pre-screen the content of the message. The school has no idea what the student will say before the student gets up and delivers his or her message. The Guidelines allow the school to show neutrality toward all speech, secular and religious.

Granting an injunction would violate the Establishment Clause. An injunction would require the government to abandon its neutral stance toward religion and become the final arbiter of what may be considered religious and what is not. Such a position would inevitably lead to hostility towards religion rather than a position of neutrality as mandated by the First Amendment. An injunction would place the government in the position of requiring the students to "speak only the religious thoughts that government want[s] [them] to speak and to pray only to the God the government want[s] [them] to pray to." *Chandler*, 180 F.3d at 1260 (*quoting Engel v. Vitale*, 370 U.S. 421, 435 (1962)). The Court in *Engel* summarized its holding by stating:

> It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.

Engel, 370 U.S. at 435 (emphasis added). Thus, the only way the government may avoid an Establishment Clause challenge is to maintain a position of neutrality, and not hostility towards religion.

The Guidelines "do not confer any imprimatur of state approval on religious sects or practices." *Widmar v. Vincent*, 454 U.S. 263, 274 (1981). Most importantly, "the failure to censor is not synonymous with endorsement." *Chabad*, 5 F.3d at 1392 (*citing Mergens*, 496 U.S. 226, 245). "There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 248. "The speech that takes place in a public forum belongs and can be attributed to the private speaker only; neither approbation nor condemnation of the private speaker's message may be imputed to the state." *Chabad*, 5 F.3d at 1392. "Any perceived endorsement of religion [here] is simply misperception; the Establishment Clause is not, in fact, violated." *Id.* at 1393 (*citing Doe*, 964 F.2d at 629).

"Even if permitting student-initiated religious speech advances religion in some sense, this does not mean the speech violates the Establishment Clause." *Chandler*, 180 F.3d at 1261. "This Court has recognized that 'our precedents plainly contemplate that on occasion some advancement of religion will result from governmental

action'... 'Not every law that confers an 'indirect' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid.'" *Id.* at 1262 (*quoting Lynch v. Donnelly*, 465 U.S. 668, 683 (1984); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973)).

It is clear that the Guidelines in this case do not primarily advance religion. It also cannot be said that the government has delegated to the students what it may not do itself. It is true that the government may not delegate to a private citizen that which it may not do itself. *See Evans v. Newton*, 382 U.S. 296 (1966). "Student religious speech must be without oversight, without supervision, subject only to the same reasonable time, place, and manner restrictions as all other student speech in school." *Chandler*, 180 F.3d at 1264-1265. In discussing what supervised speech means, the *Chandler* Court stated:

> Supervision cannot mean, therefore, mere presence. Support for this view is found in *Mergens* in which the Supreme Court found no constitutional infirmity with the provision of the EAA which permits school employees to be present for custodial purposes at religious meetings held on school property . . . ***[F]or supervision to amount to unconstitutional endorsement, it must cross the line into active endorsement, encouragement or participation.***

Id. at 1265 n.19 (emphasis added)(citations omitted). "So long as school personnel do not participate in or actively supervise student-initiated speech, [the School Board] cannot constitutionally prohibit students from speaking religiously and the permanent injunction cannot require it to." *Id.* at 1265. In this case, the school officials have no control over the content

of what the student will say, or whether a student will say anything at all. The school does not even have control over who will give the student message. The Guidelines do not mandate prayer or any other speech for that matter, and thus, there is no government delegation in this case. The school does not delegate or supervise the speech of the students.

This Court has stated, "our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action." *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984). "Student-initiated speech, therefore, even if it incidentally advances religion does not violate the Establishment Clause because it is private speech endorsing religion which the First Amendment protects." *Chandler*, 180 F.3d at 1263 (*quoting Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 965 (5th Cir. 1992).

Indeed, to require the government to remove any vestiges of religion from public life would violate the Establishment Clause.

> The prohibition of all religious speech in our public school simples, therefore, an unconstitutional disapproval of religion. If endorsement is unconstitutional because it "sends a message to nonadherents that they are outsiders," disapproval is unconstitutional because it "sends the opposite message." ... "Cleansing" our public schools of all religious expression, however, inevitably results in the "establishment" of disbelief - atheism - as the State's religion. Since the constitution requires neutrality, it cannot be the case that government may prefer disbelief over religion.

Chandler, 180 F.3d at 1261. Furthermore, "The Constitution

does not require a complete separation of church and state such that religious expression may not be tolerated in our public institutions. In fact, 'it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.'" *Id.* at 1262 (*quoting Lynch*, 465 U.S. at 673). Indeed,

> untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive dedication to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

Id. at 1261 (*quoting School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963)(Goldberg, J., concurring). The Eleventh Circuit has correctly recognized that:

> ***The discriminatory suppression of student-initiated religious speech demonstrates not neutrality but hostility towards religion*** because the "exclusion of religious ideas, symbols, and voices marginalizes religion... Silence about a subject conveys a powerful message. When the public sphere is open to ideas and symbols representing nonreligious viewpoints, culture, and ideological commitment, to exclude all those whose basis is "religious" would profoundly distort public culture.

Chandler, 180 F.3d at 1261 (emphasis added)(*quoting* McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI.

L. REV. 115, 189 (Winter 1992)). In this case, an injunction requiring the government to censor out religious messages from student speech sends a message of hostility forbidden by the Establishment Clause.

3. The Guidelines Do Not Excessively Entangle The Government With Religion.

The Guidelines do not result in excessive entanglement of government with religion. In this case, government involvement is non-existent. The government has no control over who will give the message or what will be said. The school officials do not supervise any aspect of the student message. A neutral policy granting students the right to free speech does not coerce religious conformance nor create excessive entanglement because it "precludes the state from making religion-based inquiries." *Chabad*, 5 F.3d at 1389.

The Guidelines insulate "the government from the necessity of scrutinizing the content" of the student speech. *Id.* The Guidelines "avoid the need for the state to make religion-based exclusionary judgments." *Id.* The Guidelines forbid entanglement by stating ***the content of the message shall be prepared by the student volunteer***. This Court has stated that the government would run a greater risk of excessive entanglement by monitoring and censoring religious speech. *See Widmar*, 454 U.S. at 263. The Guidelines remove government entanglement by precluding school officials from "making religious-based inquiries - such as, for example, determining what constitutes religious speech." *Chabad*, 5 F.3d at 1389. If school officials censored religious speech, they would certainly create excessive "entanglement by excluding certain speech on the ground that it is religious." *Chabad*, 5 F.3d at 1389. This Court has stated:

> We agree with the Court of Appeals that the University would risk greater "entanglement" by attempting to enforce its exclusion of "religious worship" and "religious speech". Initially, the University would need to determine which words and activities fall within "religious worship an religious teaching." This alone could prove "an impossible task in an age where many and various beliefs meet the constitutional definition of religion."

Widmar, 454 U.S. at 272 n.11. Indeed, this Court has recognized that "[i]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment." *O'Hair v. Andrus*, 613 F.2d 931, 936 (D.C. Cir. 1979). An anti-religious censorship pen will lead to excessive entanglement of government with religion.

It is certainly unconstitutional to distinguish between various forms of religious speech and non-religious speech.

> Merely to draw the distinction would require the University -- and ultimately the courts -- to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in the manner forbidden by our cases.

Widmar, 454 U.S. at 269 n.6 (citations omitted).

As Justice Souter has remarked, it is hard to "imagine a subject less amenable for the competence of the Federal Judiciary, or more deliberately to be avoided where possible" than determinations about the religious content of speech.

Lee, 505 U.S. 616-17 (Souter, J. concurring). *See also Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987)(It is a significant burden to require a religious person or organization "to predict which of its activities a secular court will consider religious"). The Guidelines do not excessively tangle government with religion. An injunction requiring the School Board to appoint a bureaucratic censor whose job is to strike through any word deemed religious in a student's speech would create a tangled web between church and state.

B.

The Guidelines Do Not Violate *Lee v. Weisman*.

Under the facts of *Lee*, this Court found coercion because the school (1) decided that prayer *should* be given, (2) selected a religious speaker to give the prayer, and (3) gave the religious speaker guidelines on how to give a non-sectarian, non-proselytizing prayer. *See Lee v. Weisman*, 505 U.S. 577, 587 (1992). In *Lee*, the "degree of school involvement" made it clear that the graduation prayers bore the imprint of the state. *Id.* at 590. This Court limited *Lee* to its specific facts. *Id.* at 599. The key to the Court's holding in *Lee* was the fact that it was the ***school*** which coerced the students to participate in a religious exercise. In this case, the Guidelines expressly prohibit involvement from the school in the entire process of selecting the student to deliver the message and in what that student will say. It is impossible under these Guidelines to find that the ***state*** is coercing a religious exercise. This state involvement in *Lee* is simply not present in the case at bar. The government is in no way mandating prayer, or telling the students how to pray, or that they must pray at all. The government is simply allowing the students to exercise their right to free speech. "Of course, in

this case we do not have state action. ***Private religious speech has even less potential for coercion***." *Chandler*, 180 F.3d at 1263 n.13. In *Lee*, Justice Souter stated:

> If the state had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the state. But that is not our case.

Lee, 505 U.S. at 630 n.8 (Souter, J., concurring).

> ***The "indirect coercion" identified in Lee by the plurality opinion*** was exerted over the audience by the State's command that there be a religious speech at graduation. Justice Kennedy's concern that "in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce," ***does not apply to the case of student-initiated religious speech***.

Chandler, 180 F.3d at 1263 n.16 (emphasis added)(citations omitted). Indeed, in the case of student-initiated religious speech, the fact that we live in a religiously pluralistic society demands respect for others' private religious speech. As Justice Scalia noted in *Lee*:

> We indeed live in a vulgar age. But surely "our social conventions" have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence... I may add, moreover, that maintaining respect for the religious observances of others is a fundamental civic

> virtue that government (including the public schools) can and should cultivate.

Lee, 505 U.S. at 637-638 (Scalia, J., dissenting).

There is simply no coercion present in the Guidelines because the only thing the Guidelines accomplish is to allow private student-initiated speech. Such speech cannot constitute governmental coercion of religious belief. The Guidelines present a different set of facts than *Lee*, and do not result in governmental coercion of religious belief.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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